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Power and Public Utilities / Power Crisis Relief Via the Department of Water Resources

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Power Crisis Relief Via the Department of Water Resources

Holly Jo Bohannon

Code Sections Affected

Public Utilities Code § 366.5 (amended); Public Utilities Code § 360.5 (new); Public Utilities Code § 355.1 (repealed); Water Code Division 27 §§ 80000-80016, 80100-80122, 80130-80134, 80200, 80250, 80260, 80270 (new).

SB 7x (Burton); 2001 STAT. Ch. 3.

AB 1x (Keeley); 2001 STAT. Ch. 4.

SB 31x (Burton); 2001 STAT. Ch. 9.

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I. INTRODUCTION

With the onset of skyrocketing electric bills and rolling blackouts, the Governor, the Legislature, and the people of California are asking two questions: How did we get into this situation? And what can we do to get out of it? Consumers are demanding frozen electric rates,¹ one investor-owned public utility has already filed bankruptcy,² and others may follow.³ Federal officials are calling for price caps,⁴ power generators are urging for expansion of California's in-state power plants,⁵ and the out-of-state power generators are running all the way to the bank with their open-market profits.⁶ Everyone agrees that something needs to be done immediately; however, opinions vary greatly on *how* to correct California's power problem.⁷

During an extraordinary legislative session, the Legislature passed Chapter 3 as a temporary solution.⁸ This statute authorized the Department of Water Resources (DWR) to enter into contracts with energy suppliers to buy and sell electricity in an effort to supplement the net shortages of electricity provided by California's investor-owned utilities.⁹ Second, the Legislature extended the DWR's authorization to buy and sell electricity until January 1, 2003, and to issue revenue bonds.¹⁰ Third, the Legislature made clarifying and modifying changes to the revenue provisions of Chapter 4.¹¹

1. See Letter from Nettie Hoge, Executive Director, The Utility Reform Network (TURN), to Rod Pacheco, Assemblymember (Sept. 26, 2000) (on file with the *McGeorge Law Review*) (arguing that California is bailing out rich, investor-owned utilities at the expense of consumers).

2. *In re Pac. Gas & Elec. Co.*, 263 B.R. 306 (Bankr. N.D. Cal. 2001).

3. See Dan Walters, *Blackout Threat Dims, but California Still Faces Tough Energy Decisions*, SACRAMENTO BEE, June 25, 2001, <http://www.sacbee.com/news/special/power/072501walters.html> (copy on file with the *McGeorge Law Review*) (indicating that Southern California Edison would likely follow Pacific Gas and Electric into bankruptcy).

4. CAL. ST. AUDITOR BUREAU OF ST. AUDITS, *Energy Deregulation: The Benefits of Competition Were Undermined by Structural Flaws in the Market, Unsuccessful Oversight, and Uncontrollable Competitive Forces*, No. 2000-134.1R, at 27 (2001).

5. See *Powerful Ideas: Solutions for Rebuilding California's Troubled Electricity Market*, INDEPENDENT ENERGY PRODUCERS, May 2, 2001, at 21 [hereinafter *Powerful Ideas*] (indicating that in March 2001 the California Energy Commission had received eleven applications for power plant expansion from developers).

6. See CALIFORNIA PUBLIC UTILITIES COMMISSION, REPORT TO GRAY DAVIS: *California's Electricity Options and Challenges* 18 [hereinafter CPUC Report], available at http://www.cpuc.ca.gov/published/report/gov_report.htm (last visited July 30, 2001) (copy on file with the *McGeorge Law Review*) (noting that power companies reported extraordinary profits in the summer of 2000).

7. See Dan Walters, *Great California Energy Crisis May Be Heading Toward a Climax*, SACRAMENTO BEE, June 19, 2001, <http://www.sacbee.com/news/special/power/062901walters.html> (copy on file with the *McGeorge Law Review*) (discussing two levels of the energy crisis, both real and political).

8. CAL. WATER CODE § 200 (enacted by Chapter 3).

9. *Id.*

10. *Id.* §§ 80100-80122 (enacted by Chapter 4).

11. *Id.* §§ 80130, 80132, 80200 (amended by Chapter 9).

II. BACKGROUND

A. *How the California Public Utilities Commission (CPUC) Placed Deregulation in Motion*

In December 1995, the CPUC issued a decision that required California's investor-owned utilities (IOUs) to purchase power from the federally regulated wholesale market.¹² The federal wholesale market was created by the Energy Policy Act of 1992 and is governed by the Federal Energy Regulatory Commission (FERC).¹³ Subsequently, the CPUC created the Independent System Operator (ISO) and the California Power Exchange (PX) to facilitate deregulation.¹⁴ The ISO is responsible for maintaining the transmission grid for all electrical power in California and keeping the electricity supply and demand in balance in real time.¹⁵ The PX, which was disbanded in 2002, ran a daily auction establishing publicly available hourly market prices for energy.¹⁶

B. *Legislative Response to CPUC: AB 1890*

In 1996, the Legislature unanimously¹⁷ passed Chapter 854 (commonly known and hereinafter referred to as AB 1890) under the framework of the 1995 CPUC deregulation decisions.¹⁸ Legislators intended AB 1890 to restructure the electric utility industry into a more competitive and efficient system that would lower electrical rates for residential and commercial consumers.¹⁹ AB 1890 mandated the IOUs: San Diego Gas & Electric (SDG&E), Pacific Gas & Electric (PG&E), and Southern California Edison (SCE) to divest themselves of their generation assets in an attempt to make the IOUs buy power on an open market and encourage competition.²⁰ The statute also established the opportunity for

12. See Letter from Bill Leonard, Assemblymember, to Assembly Republican Caucus Members (Feb. 7, 2001) [hereinafter Leonard Letter] (on file with the *McGeorge Law Review*) (discussing deregulation and the background of the power crisis).

13. The Energy Policy Act of 1992, 42 U.S.C.A. § 13451 (West 1995 & Supp. 2001).

14. See CPUC Decision 95-12-063 (Dec. 28, 1995) (creating ISO and PX as the exclusive vehicles for the selling and purchasing of all electric power in California (modified by D.96-01-009 on Jan. 10, 1996)).

15. *Powerful Ideas*, *supra* note 5, at 11.

16. *Id.*

17. Senate vote, available at http://www.legalinfo.ca.gov/pub/95-96/bill/asm/ab_1851-1900/ab_1890_vote_96031-1142AM_sen_floor.html (copy on file with the *McGeorge Law Review*) (listing 39 Ayes and 0 Noes); Assembly vote, available at http://www.legalinfo.ca.gov/pub/95-96/bill/asm/ab_1851-1900/ab_1890_vote_96083_0943PM_asm_floor.html (copy on file with the *McGeorge Law Review*) (listing 77 Ayes and 0 Noes).

18. Leonard Letter, *supra* note 12.

19. See ASSEMBLY PROPOSED CONFERENCE REPORT NO. 1, COMMITTEE ANALYSIS of AB 1890, at 1 (Aug. 28, 1996), available at http://www.legalinfo.ca.gov/pub/95-96/bill/asm/ab_1851-1900/ab_1890_cfa_960905_11437_asm_floor.html (copy on file with the *McGeorge Law Review*) (stating the Bill's purpose: to move to a competitive market, lower the cost of electricity, attract jobs, and reduce power outages).

20. 1996 Cal. Stat. Ch. 854, sec. 10, at 20 (enacting CAL. PUB. UTIL. CODE § 330(k)(1)).

IOUs to regain the money spent on stranded assets²¹ and froze retail rates until an IOU recovered its stranded assets, at which point the IOU could pass on the actual costs of energy to consumers without a cap.²² The statute further codified the CPUC's creation of the ISO²³ and PX.²⁴

C. What Caused the Power Crisis?

Critics and supporters of deregulation have differing theories about the cause of California's power crisis; however, many circumstances contributed to the electrical shortages and rising consumer electric bills.²⁵ First, industry and population growth in California and other western states were significantly greater than anyone predicted.²⁶ This growth caused an ever-increasing demand for power which depleted California's electrical reserves.²⁷ Second, under AB 1890, the California IOUs divested themselves of generation assets and other states have been unable²⁸ or unwilling²⁹ to export power to California.³⁰ Third, in the winter of 2000, the price of natural gas doubled, causing the generation costs for natural gas fueled power plants to increase significantly.³¹ Fourth, the prohibition³² against long-term contracts caused IOUs to rely on spot purchases and out-of-market purchases.³³ The volatile and high wholesale spot prices and the necessity of out-of-market purchases at higher prices resulted in the inability of the IOUs to obtain credit for future power purchases.³⁴

21. See CAL. PUB. UTIL. CODE §§ 330(q)-(w) (West 1975 & Supp. 2002) (defining stranded assets as an IOU's investment in power generation).

22. *Id.*

23. See *id.* § 345 (West 1975 & Supp. 2002) (creating the ISO and defining its powers and duties).

24. See *id.* § 355 (West 1975 & Supp. 2002) (creating the PX and defining its powers and duties).

25. See CPUC Report, *supra* note 6, at 23, (stating the following reasons for California's power crisis: inadequate new power supplies, increasing demand, aging existing power plants, limited transmission facilities, and the State's reduced role in energy efficiency and construction of new resources); Lynne Kiesling, *Getting Electricity Deregulation Right: How Other States and Nations Have Avoided California's Mistakes*, Policy Study No. 281, REASON PUBLIC POLICY INSTITUTE (RPPI), Apr. 2001, available at <http://www.rppi.org/electele.html> [hereinafter Kiesling Report] (copy on file with the *McGeorge Law Review*) (listing the following reasons for California's power crises: low default prices for incumbent utilities, mandatory divestiture of generation assets, no accelerated phase-in period for all consumers to be allowed choice in electric supplier, and one central power exchange).

26. See CPUC Report, *supra* note 6, at 26-27 (describing California's growing economy and the increased demand for power).

27. *Id.*

28. *Powerful Ideas*, *supra* note 5, at 12-13.

29. See *id.* at 13 (describing the IOUs' credit problems).

30. *Id.* at 12.

31. *Id.* at 13.

32. Anthony Pescetti, *Old-Style Agency Stifles New Energy Market*, Dec. 22, 2000 at 2 (copy on file with the *McGeorge Law Review*).

33. *Id.*

34. *Powerful Ideas*, *supra* note 5, at 13-14.

D. Governor's Broad Emergency Powers

The Governor declared a state of emergency on January 17, 2001³⁵ and was thereby granted broad powers during the energy crisis.³⁶ Those powers include authorization to perform any acts that may be necessary to utilize the broad powers granted during the state of emergency³⁷ including appropriating money from any legally available fund to respond to the emergency.³⁸ Under this authority, the Governor authorized the DWR to enter into contracts for the purchase, distribution, transmission, and sale of electric power.³⁹

E. Emergency Legislation Passed

On January 19, 2001, Governor Davis signed Chapter 3 authorizing the DWR to enter contracts to buy and sell electricity. Chapter 3 also created the Electrical Power Fund, and appropriated \$400 million for that purpose.⁴⁰ On February 1, 2001, the Governor signed Chapter 4 to continue the DWR's authorization to buy and sell electricity.⁴¹ On May 10, 2001, the Governor signed Chapter 9, which contained modifications and technical additions to the revenue provisions of Chapter 4.⁴² The purpose of the emergency legislation was to authorize the DWR to supplement the IOUs' generation net shortages⁴³ of electricity to end rolling blackouts.⁴⁴

III. EXISTING LAW

Section 366.5 of the Public Utilities Code provides guidelines for changing the aggregator or supplier of electric power⁴⁵ for small commercial⁴⁶ and

35. Proclamation by the Governor of the State of California, Jan. 17, 2001, *available at* <http://www.cueanic.com/members/Documents/govemelectergdeclar.PDF> (copy on file with the *McGeorge Law Review*).

36. *See* CAL. GOV'T CODE § 8625 (West 1992) (containing the California Emergency Services Act, which authorizes the Governor to declare a state of emergency and gives him other broad powers, including the power to appropriate funds from any source available to alleviate the risks and damage caused by the emergency).

37. *Id.* § 8646 (West 1992).

38. *Id.* § 8645 (West 1992).

39. *Id.*

40. CAL. WATER CODE § 200 (enacted by Chapter 3).

41. *Id.* §§ 80100-80122 (enacted by Chapter 4).

42. *Id.* §§ 80130, 80132, 80200 (amended by Chapter 9).

43. *See* ASSEMBLY ENERGY-UTILITIES COMMITTEE, COMMITTEE ANALYSIS of AB 1x, at 7 (Jan. 31, 2001) (defining a net shortage as the shortage that occurs when the electricity needs of the customers are not being met by the generation assets owned by the utilities).

44. *Id.*

45. *See* CAL. PUB. UTIL. CODE §§ 366.5(g), (i) (West 1975 & Supp. 2002) (listing the following two exemptions to this section: (1) public agencies serving customers within their jurisdiction, and (2) electrical corporations serving customers who default to their service).

residential customers.⁴⁷ This section⁴⁸ also provides guidelines for changing the aggregator or supplier of electric power for residential customers via the Internet.⁴⁹ If the CPUC determines that unauthorized changes are occurring as a result of section 366.5, it may mandate written confirmation for all residential service-provider changes.⁵⁰ In addition to the written confirmation required by this section, the written confirmation must include an acknowledgment,⁵¹ which cannot be included with a check or sweepstakes solicitation.⁵² The supplier of electric power must keep all confirmations for at least two years from the date of the confirmation.⁵³

If a supplier of electric power switches the service of a small commercial or residential customer without that customer's consent, then that supplier is liable to the former electric provider for revenues collected as a result of the switch.⁵⁴ The supplier is also liable to the customer for amounts paid by the customer over the former electric provider's rate.⁵⁵

IV. NEW LEGISLATION

A. Chapter 3

Chapter 3 authorized the DWR to enter contracts to buy and sell electricity to supplement the IOUs' electric net shortage.⁵⁶ This new legislation also established in the State Treasury the DWR Electrical Power Fund (EPF) as a continuously appropriated fund and transferred four million dollars from the General Fund⁵⁷ to the EPF. Chapter 3 also required all revenues collected by the DWR under Chapter 3 to be deposited into the EPF.⁵⁸ By its own terms, Chapter

46. *Id.* § 366.5(a).

47. *Id.* § 366.5(b).

48. *Id.* § 366.5(j) (amended by Chapter 4) (providing that "[e]lectrical power sold to customers pursuant to Section 80100 of the Water Code is not subject to" section 366.5 of the Public Utilities Code).

49. *See id.* §§ 366.5(c), (c)(1)-(2) (requiring that before a customer may change the supplier of electric power via an Internet transaction, the customer accessing the website of a supplier must respond to a separate screen containing the language, "I acknowledge that in entering this transaction I am voluntarily choosing to change the entity that supplies me with my electric power," and a separate screen shall offer the customer the chance to complete or terminate the transaction).

50. *Id.* § 366.5(h).

51. *See* CAL. PUB. UTIL. CODE § 366.5(d)(1) (containing the acknowledgment's required language).

52. *Id.* § 366.5(d)(2).

53. *See id.* § 366.5(f) (requiring the supplier of electric power to make the records available, upon request, to the customer and to the CPUC).

54. *Id.* § 366.5(e).

55. *Id.*

56. CAL. WATER CODE § 200(b) (enacted by Chapter 3).

57. CAL. GOV'T CODE § 16300 (West 1995) (establishing the General Fund and stating that the Fund consists of money received into the treasury that is not required to be credited to any other fund).

58. CAL. WATER CODE § 200(f) (enacted by Chapter 3).

3 became inoperative on February 2, 2001,⁵⁹ which prompted the Legislature to extend the provisions of Chapter 3 by including them in Chapter 4.

B. Chapter 4

1. California Procurement Adjustment

The California Procurement Adjustment (CPA) is defined as the difference between the cost of generating power and the retail rate generation charge.⁶⁰ The CPUC is to determine what portion of CPA is allocable to DWR-acquired power.⁶¹ Electrical corporations must then pay this amount to the DWR for deposit into the Electric Power Fund.⁶²

2. Powers Granted to the DWR

With the enactment of Chapter 4, the Legislature discontinued the Power Exchange and repealed the mandate for utilities to obtain power through the Power Exchange.⁶³ The DWR is authorized to purchase and sell power⁶⁴ to retail end-use customers⁶⁵ and certain publicly-owned utilities⁶⁶ at prices determined by specified variables.⁶⁷ The DWR is further authorized to adopt and implement

59. *Id.* § 200(k) (enacted by Chapter 3).

60. CAL. PUB. UTIL. CODE § 360.5 (enacted by Chapter 4).

61. *Id.*

62. *Id.*; see CAL. WATER CODE § 80200 (enacted by Chapter 4) (re-establishing the Electric Power Fund in the State Treasury for the DWR).

63. ASSEMBLY ENERGY-UTILITIES COMMITTEE, ANALYSIS of AB 1x, at 7 (Jan. 31, 2001).

64. See CAL. WATER CODE § 80002.5 (enacted by Chapter 4) (requiring the DWR to sell power to retail end use customers on a pro rata basis).

65. CPUC, *Rate Agreement By and Between State of California Department of Water Resources and State of California Public Utilities Commission*, Art. 1, § 1.1 at 4 (Sept. 6, 2001), available at <http://www.cpuc.ca.gov/published/report/93610PDF> (copy on file with the *McGeorge Law Review*) (defining retail end-use customers as customers within the service area of an electric corporation that has purchased power from the DWR under Chapter 4).

66. CAL. PUB. UTIL. CODE § 9604 (West 1994 & Supp. 2002) (defining a publicly owned utility as: a municipality or municipal corporation operating as a "public utility" furnishing electric service as provided in section 10001, a municipal utility district furnishing electric service formed pursuant to Division 6 (commencing with section 11501), a public utility district furnishing electric services formed pursuant to the Public Utility District Act set forth in Division 7 (commencing with section 15501), an irrigation district furnishing electric services formed pursuant to the Irrigation District Law set forth in Division 11 (commencing with section 20500) of the Water Code, or a joint powers authority that includes one or more of these agencies and that owns generation or transmission facilities, or furnishes electric services over its own or its member's electric distribution system.).

67. CAL. WATER CODE §§ 80100(a)-(f) (enacted by Chapter 4) (specifying the following variables to be considered by the DWR in determining the price it is willing to pay for power: (1) the intent of this program is to acquire contracts with "reliable service at the lowest price per kilowatthour," (2) the need for "contract supplies to fit each aspect of the overall energy load profile," (3) "[t]he desire to severe as much low-cost power

emergency regulations to carry out these provisions,⁶⁸ with the limitation that the DWR cannot take ownership of generation, transmission, or distribution assets.⁶⁹ The CPUC is to set rates that cover revenue requirements of DWR.⁷⁰ However, rate increases are prohibited for residential customers who consume less than 130 percent of baseline quantities.⁷¹

The DWR's contracting power ends after January 1, 2003.⁷² During that time, the DWR must make quarterly and annual reports to the Governor and the Legislature, describing its activities and expenditures pursuant to Chapter 4.⁷³ Chapter 4 further requires the Bureau of Audits to conduct financial and performance audits of the DWR's implementation of the powers authorized under Chapter 4.⁷⁴

3. *Electric Power Fund*

Under Chapter 4, the Legislature transferred an additional \$495,755,000 from the General Fund⁷⁵ to the EPF⁷⁶ and requires repayment to the EPF from revenues generated by this act.⁷⁷ Chapter 4 also provides for the EPF to be continuously funded during the statute's life.⁷⁸ The Legislature further transferred additional funds⁷⁹ to the DWR for administrative costs for 2000 through 2001 and authorized the DWR to hire staff with salaries that exceed the Department of Personnel's standards.⁸⁰

Pursuant to Chapter 4, the DWR is further authorized to issue revenue bonds with Department of Finance and State Treasurer approval.⁸¹ The value of the bonds cannot exceed four times the yearly CPA and also cannot pledge or

as possible," (4) "[t]he duration and timing of contracts," (5) the duration of the sellers' offers; and (6) "[t]he desire to secure as much . . . renewable energy as possible").

68. *Id.* § 80012 (enacted by Chapter 4).

69. *Id.*

70. *See id.* § 80110 (enacted by Chapter 4) (authorizing the CPUC to enter into an agreement with the DWR regarding electricity rates).

71. *Id.*

72. *Id.* § 80260 (enacted by Chapter 4).

73. CAL. WATER CODE § 80250 (enacted by Chapter 4).

74. *Id.* § 80270 (enacted by Chapter 4) (requiring that the Bureau of State Audits complete an initial report by December 31, 2001 and a final audit by March 31, 2003).

75. CAL. GOV'T CODE § 16300 (West 1995).

76. CAL. WATER CODE § 80270(a) (enacted by Chapter 4).

77. *Id.* § 80200(b) (enacted by Chapter 4).

78. *Id.* § 80200(a) (enacted by Chapter 4).

79. *Id.* § 80270(b) (enacted by Chapter 4) (listing \$4,245,000 for administrative costs).

80. *See id.* §§ 80122(a), 80270(b) (enacted by Chapter 4) (appropriating the additional funds for the purpose of hiring higher-skilled employees to effectively implement Chapter 4).

81. *Id.* § 80132 (enacted by Chapter 4) (instructing the Department of Finance to notify, in writing, the Chairperson of the Joint Legislative Budget Committee and the chairperson of the appropriations committee in each house).

obligate full faith and credit nor taxing powers.⁸²

C. Chapter 9

This statute clarifies and makes technical changes to the bond provisions in Chapter 4.⁸³ For example, while Chapter 4 authorized the DWR to issue bonds,⁸⁴ Chapter 9 places a cap on that bond authority.⁸⁵ This measure also prohibits the DWR from using revenues collected through bonds issued pursuant to Chapter 4 to repay any undercollected⁸⁶ amount due to any electrical corporation.⁸⁷ Chapter 9 further requires repayment to the General Fund and DWR to be made as soon as practicable.⁸⁸ Finally, Chapter 9 provides for review of lawsuits arising from Chapter 4 and further protects CPUC orders under Chapter 4 from appellate court review.⁸⁹

V. ANALYSIS OF NEW LEGISLATION

A. Chapter 4

The bond provisions of both Chapter 4 and Chapter 9 receive the most support. Supporters of the bond provisions are concerned that without the issuance of bonds, Chapter 4 and other power crisis legislation will deplete the General Fund and the State will be unable to continue other public interest programs, including education, health care, and public safety services.⁹⁰ However, critics assert that the revenue bonds will drive power plants or cogeneration facilities out of business and decrease the electric supply.⁹¹

82. CAL. WATER CODE § 80132(f) (enacted by Chapter 4) (requiring that each bond contain the following statement: "Neither the faith and credit nor the taxing power of the State of California is pledged to the payment of the principal of or interest on this bond.").

83. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS of Chapter 9, at 1 (May 7, 2001).

84. CAL. WATER CODE §§ 80130, 80132, 80134 (enacted by Chapter 4).

85. *Id.* § 80130 (amended by Chapter 9) (limiting the total bond issuance to an aggregate of \$13,423,000 or four times the annual revenues generated by the CPA, whichever is lower).

86. *California Mfrs. Ass'n v. Pub. Utils. Comm'n*, 24 Cal. 3d 836, 842, 598 P.2d 836, 839 (1979) (stating that under collections occur when the difference between the utility's estimated costs and revenues and its actual cost experience is higher than anticipated).

87. CAL. WATER CODE § 80200 (amended by Chapter 9).

88. *Id.* § 80200(b)(4) (amended by Chapter 9).

89. *See* CAL. PUB. UTIL. CODE § 1731(b) (amended by Chapter 9) (providing guidelines for appellate review of any CPUC order issued pursuant to Chapter 4).

90. *See* Letter from Andrew L. Stern, International President, Service Employees International Union (SEIU), to Rod Wright, Assemblymember (May 1, 2001) (on file with the *McGeorge Law Review*) (writing on behalf of the 450,000 employees in California whose jobs rely on funding from the general fund); Letter from Conni Barker, Director of Government Relations, California Psychiatric Association, to Members of the State Assembly (May 2, 2001) (on file with the *McGeorge Law Review*) (expressing concerns about funding for mental health programs).

91. *See* Kahl-Pownall Advocates for the Western States Petroleum Association, *More Rolling Blackouts*

Assembly Republicans fear that the bond measure fails to address the increasing need for power supply in California and the immediate issues plaguing PG&E and SCE including debt and failing credit.⁹² One senator⁹³ criticizes Chapters 3 and 4 by claiming that the new legislation will cause Californians to pay high power prices for many years.⁹⁴ He also claims that California's residential customers are paying for commercial customers' electric use via taxes.⁹⁵ Additionally, consumers in a municipally-owned utility district⁹⁶ are paying other districts' utility bills through taxes.⁹⁷ He asserts that, if California wants to lower long-term power prices, the State needs to promote a "crash program" for new power plant construction.⁹⁸

A main purpose of Chapters 3, 4, and 9 is to allow the DWR to supply the IOUs' net shortage and to end the rolling blackouts that were leaving Californians in the dark.⁹⁹ However, Chapter 4 does not compel the DWR to purchase enough power to cover the full shortage.¹⁰⁰ The DWR may purchase only the power it determines is not too expensive.¹⁰¹ In determining what is too expensive, the DWR has two main concerns.¹⁰² First, the DWR is alarmed by the increasing rate at which the EPF is being spent.¹⁰³ Second, the DWR fears that, if it buys power regardless of price, the market price will skyrocket.¹⁰⁴ As a result, the DWR is only covering approximately ninety percent of the net shortage, and the ISO has ordered the generators to supply the remaining ten percent, without stating who will pay for it.¹⁰⁵ As a result, Duke Energy filed suit to force DWR to pay for the ten percent or to force ISO to stop ordering generators to supply the net shortage without a creditworthy buyer.¹⁰⁶

Certain with Qualifying Facilities Plan: No on SB 31x and AB 8x (March 21, 2001) (on file with the *McGeorge Law Review*) (defining qualifying facilities as "power plants or cogeneration facilities . . . that operate on natural gas, biomass, wind and solar" power).

92. Press Release, Republican Assembly GOP, *Assembly GOP Stress More Power Supply* (Jan. 17, 2001) (copy on file with the *McGeorge Law Review*).

93. Memorandum from Thomas McClintock, Senator, to the Senators and Assemblymembers of California (Jan. 24, 2001) [hereinafter McClintock Memorandum] (on file with the *McGeorge Law Review*).

94. *Id.* at 2.

95. *Id.*

96. CAL PUB. UTIL. CODE § 10001 (West 1994) (defining a municipally-owned utility as a public utility that is acquired and operated by a municipality or municipal corporation).

97. McClintock Memorandum, *supra* note 93, at 2.

98. *Id.*

99. Letter from Guy Phillips to Assembly Speaker Bob Hertzberg at 1 (Feb. 15, 2001) [hereinafter Phillips Letter] (on file with the *McGeorge Law Review*).

100. *Id.*

101. See CAL. WATER CODE § 80100 (amended by Chapter 4) (stating that the DWR can contract with any entity to purchase power on such terms and at such prices the DWR deems appropriate).

102. Phillips Letter, *supra* note 99.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

B. Deregulation in Other States

Despite the problems California has experienced by deregulating its electric industry, other states have implemented more successful deregulation plans. Pennsylvania passed deregulation legislation¹⁰⁷ and has fully implemented deregulation throughout the state.¹⁰⁸ Its consumers are enjoying an average price decrease of thirty percent.¹⁰⁹ Deregulation experts credit Pennsylvania's success to several factors: market-based default prices,¹¹⁰ non-mandatory divestiture of generation assets,¹¹¹ accelerated phase-in of all customers,¹¹² third-party metering services, and an atmosphere that encouraged alternate providers to enter Pennsylvania's electricity market and create competition.¹¹³ Pennsylvania currently has 130 power suppliers competing for electricity consumers in the state.¹¹⁴

Similarly, Texas has set the stage for a successful deregulation plan by providing for phased-in transition to full retail choice by January 2002,¹¹⁵ requiring incumbent utilities to restructure their integrated supply chain,¹¹⁶ providing predictable and efficient regulation of new generation plant construction¹¹⁷ and not restricting the contracting abilities of its power suppliers and buyers.¹¹⁸ One report¹¹⁹ on Texas deregulation credits the Texas Legislature with having defined parameters for deregulation while allowing competition to evolve naturally.¹²⁰

Other states,¹²¹ with less initial deregulation success, have adopted measures that succeeded in encouraging alternate providers to enter into the market and increase competition.¹²² Perhaps California should be looking to Pennsylvania

107. H.R. 1509, Gen. Assem., Reg. Sess. (Pa. 1995).

108. Kiesling Report, *supra* note 25.

109. *Id.*

110. See *id.* at Part 2(A) (stating that using a market-based default or standard offer price encouraged alternate providers to join the Pennsylvania electricity market and compete instead of setting a low standard offer price that would only benefit incumbent providers).

111. 66 PA. CONS. STAT. § 2804(5) (1996) (amended by Chapter 28).

112. See 15 PA. CONS. STAT. § 7405(A)(1) (1996 & Supp. 2002) (amended by Chapter 74) (providing guidelines for customer choice in electric cooperative territories).

113. Kiesling Report, *supra* note 25, at Part 2(B).

114. *Id.*

115. TEX. UTIL. CODE ANN. § 39.102 (Vernon 1999 & Supp. 2002) (added by SB 7).

116. See *id.* § 39.051 (Vernon 1999 & Supp. 2002) (added by SB 7) (providing that utilities must separate their business activities into "a power generation company; a retail electric provider; and a transmission and distribution utility," all operating independently).

117. Kiesling Report, *supra* note 25, at Part 4(B)(2).

118. *Id.*

119. *Id.* at Part 4(C).

120. *Id.*

121. See *id.*, at Executive Summary (listing Massachusetts and Rhode Island as states with implemented and revised deregulation plans).

122. *Id.* at Part 4(C).

rather than to the DWR for deregulation guidance.

VI. CONCLUSION

Since Chapter 3 ended in February 2001 and has been replaced by Chapter 4, and Chapter 9 merely makes technical and clarifying changes to Chapter 4—the most significant of the three chapters.

The DWR is only covering approximately ninety percent of the net shortage because Chapter 4 does not require the DWR to purchase enough power to cover the full shortage.¹²³ Duke Energy Corporation has already filed a lawsuit against the DWR, and others may follow as a result of the ISO ordering the generators to supply the remaining ten percent of the shortage.¹²⁴

While Chapter 4 has helped to alleviate the immediate threat of rolling blackouts by supplying part of the net shortage, it does nothing to foster the natural evolution of competition like the Pennsylvania and Texas deregulation plans; instead Chapter 4 only provides more regulation and a short-term fix.¹²⁵

123. Phillips Letter, *supra* note 99, at 1.

124. *Id.*

125. CAL. WATER CODE § 80260 (enacted by Chapter 4) (limiting the term of the DWR's contracting power to January 1, 2003).